BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEITH F. BRAEGGER, Claimant, v. PETE MICKELSEN & SONS MASONRY, INC., Employer, and INSURANCE COMPANY OF THE WEST, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2000-016939** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** Filed March 21, 2008

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Twin Falls on August 1, 2007. Claimant was present and represented by Mark R. Wasden of Twin Falls. Thomas V. Munson of Boise represented Employer Pete Mickelson & Sons Masonry ("Employer"). Kenneth L. Mallea of Meridian represented the State of Idaho, Industrial Special Indemnity Fund ("ISIF"). Oral and documentary evidence was presented and the record remained open for the taking of three post-hearing depositions. The parties then submitted post-hearing briefs and this matter came under advisement on December 5, 2007.

ISSUES

By agreement of the parties at hearing, the issues to be decided by the Commission as the result of the hearing are:

1. Whether and to what extent Claimant is entitled to medical benefits pursuant to Idaho Code § 72-432;

2. Whether Claimant is medically stable, and if so, the date thereof;

3. Whether and to what extent Claimant is entitled to permanent partial impairment ("PPI") benefits;[1]

4. Whether and to what extent Claimant is entitled to permanent partial disability ("PPD") benefits;

5. Whether apportionment pursuant to Idaho Code § 72-406 is appropriate;

6. Whether Claimant is an odd-lot worker;

7. Whether ISIF is liable for benefits pursuant to Idaho Code § 72-332; and, if so,

8. Apportionment under the *Carey* formula;

9. Whether the Industrial Commission should retain jurisdiction beyond the applicable statutes of limitation; and

10. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 for Employer/Surety's wrongful denial of medical benefits.

CONTENTIONS OF THE PARTIES

Claimant contends that Employer is responsible for future medical benefits that will be incurred for a recommended left thumb surgery. Claimant argues that he is also entitled to PPI

[1] Claimant withdrew this issue in his post-hearing brief and it will not be decided.

benefits equaling 10% of the whole person, an amount already accepted and paid by Employer. He also asserts that he can no longer work as a mason and has suffered PPD in excess of PPI in the amount of 50% of the whole person due to injuries to his left ulnar nerve and left thumb basal joint. He argues against apportioning any of his disability to his pre-existing asymptomatic osteoarthritis. Finally, Claimant contends that he is entitled to attorney fees for Employer/Surety's unreasonable denial of a left thumb basal joint surgery recommended by his treating physician and the Commission should retain jurisdiction beyond the statute of limitations so that Claimant may obtain time-loss benefits surrounding that surgery.

Employer contends that Claimant has incurred no PPD above PPI, however, in the event PPD is found, it should be apportioned to pre-existing conditions. Further, in the unlikely event that Claimant is found to be an odd-lot worker, liability should be apportioned with ISIF according to the *Carey* formula. Claimant is not motivated to return to the work force even though there are jobs available to him. Moreover, according to Employer's independent medical evaluators, Claimant's restrictions are due to his underlying arthritis, not his work injury. Finally, Claimant is not entitled to an award of attorney fees for Employer/Surety's wrongful denial of a surgery because Claimant has never requested any surgery.

ISIF contends that Claimant is not an odd-lot worker and, even if he is determined to be such, he has failed to establish the criteria necessary to invoke ISIF liability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the hearing.
2. Claimant's Exhibits 1-15 admitted at hearing.
3. Employer's Exhibits A-R admitted at hearing.

4. The post-hearing depositions of: Gilbert K. Crane, M.D., taken by Claimant on August 9, 2007; Michael S. Weiss, M.D., taken by Employer on August 28, 2007; Barbara K. Nelson, M.S., C.R.C., taken by Employer on August 29, 2007; and Mary Barros-Bailey, Ph.D., M.A., C.R.C., C.D.M.S., C.L.C.P., N.C.C., A.B.V.E.-D., taken by ISIF on August 29, 2007.

Employer's objection at page 20 of Ms. Nelson's deposition is sustained and their objection at page 21 is overruled.

After having considered all the above evidence and the briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 65 years of age and resided in Paul, Idaho, at the time of the hearing.

2. Claimant was in the U.S. Army from 1966 to 1968 when he was honorably discharged. Claimant's work experience consists primarily of dairy work, carpentry, and masonry. He worked for Employer for about 14 years before his April 26, 2000, industrial accident. During that time, Claimant testified that he worked with cinder blocks about 95% of the time, and bricks the other 5%. Cinder blocks are heavier than brick and they require more physical effort to set.

3. On April 26, 2000, "I had - - When I went to reach for a block, I had a block crammed into my thumb. I pulled my arm back and hit the cinder block wall hitting my elbow." Hearing Transcript, p. 16.

4. Claimant first sought treatment on May 2, 2000, when he presented to the emergency room at Cassia Regional Medical Center. The ER physician assessed a contusion of

the left hand and a left wrist sprain by history and an impingement of the ulnar nerve at the left wrist. He was referred to orthopedic surgeon Gilbert K. Crane, M.D.

5. Claimant first saw Dr. Crane on May 6, 2000. At that time, Dr. Crane took Claimant's history of hyperextending his thumb and wrist, and experiencing left thumb pain and numbness in the lateral half on his 3rd digit and all of the 4th and 5th digits down to the wrist, generally following the ulnar nerve distribution. Claimant denied any previous injuries to his thumb, hand, or wrists, and informed Dr. Crane that he had not been to a doctor since sometime in the 1970s. Dr. Crane described Claimant's injury as "somewhat unusual." He found evidence of pre-existing arthritis at the base of Claimant's left thumb and wrist, and determined that by jamming his thumb, Claimant aggravated the basal joint arthritis. Dr. Crane opined, "Of greater significance and more concern however is the significant ulnar nerve dysfunction which I suspect is related to a neurapraxia stretch type injury of the ulnar nerve as his thumb got forced into radial deviation. Certainly he has a [sic] classic physical exam findings for ulnar nerve dysfunction." Claimant's Exhibit 2, p. 4. Dr. Crane also noted positive motor strength loss along the ulnar nerve distribution. He ordered nerve conduction studies and EMGs that revealed moderately severe ulnar neuropathy across Claimant's left elbow. Dr. Crane released Claimant to essentially one-handed work.

6. When conservative treatment failed, Dr. Crane performed a left ulnar nerve decompression and anterior subcutaneous transposition on June 21, 2000.

7. Because Claimant's symptoms persisted post-operatively, on December 26, 2000, Dr. Crane requested a second opinion from Dr. Mark Clawson, a Boise hand surgeon. Dr. Clawson responded by letter dated December 30, 2000. Claimant was complaining of numbness in his left ring and small fingers, and pain in both wrists and the left basal joint region

of his left thumb. Dr. Clawson diagnosed left basal joint arthrosis and bilateral wrist arthritis. Dr. Clawson recommended a "CMC arthroplasty of the LRTI variety." Claimant was to continue seeing Dr. Crane for management of his upper extremity complaints.

8. On April 3, 2001, Michael T. Phillips, M.D., a retired orthopedic surgeon, saw Claimant at Employer's request. Dr. Phillips diagnosed severe wrist and left thumb arthritis as evidenced on radiographic studies performed on May 9, 2000. He did not believe Claimant's accident permanently aggravated the pre-existing arthritis. Dr. Phillips assigned a 4.5% upper extremity PPI rating for sensor ulnar neuropathy with no objective finding of ulnar nerve motor loss. He doubted that Claimant could return to work as a mason due to the natural progression of his underlying arthritis rather than his work injury.

9. In a June 18, 2001, letter to Claimant's then-attorney, Dr. Crane noted that Claimant's ulnar nerve was improving but that he still had some deficits in grip strength. He also noted that Claimant had attempted to return to work as a mason, but was unable to due to the lack of strength and pain related to the basal joint injury. Dr. Crane assigned an 11% upper extremity PPI rating for Claimant's ulnar nerve dysfunction and a 13% upper extremity PPI rating for Claimant's left thumb basal joint arthritis and instability. He then apportioned 60% to pre-existing arthritis and 40% to the subject accident. Regarding Claimant's left wrist and hand, Dr. Crane opined, based upon x-rays taken shortly after Claimant's accident, that those problems were pre-existing and not permanently aggravated by the accident. Dr. Crane further opined that Claimant would benefit from "salvage procedures" for the advanced arthritis in his thumb and wrist, and, even if successful in relieving Claimant's pain, he would still be unable to return to work as a mason due to weakness within his left hand and wrist.

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10. Dr. Phillips had occasion to re-examine Claimant on January 20, 2004. At that time, Claimant was complaining of pain in the basal joint of his left thumb, aggravated by activity, and still some numbness in the distribution of the ulnar nerve. His overall pain complaints were less than at the time of his original injury. Dr. Phillips noted that Claimant's ulnar nerve motor function was within normal limits. He did not change his prior PPI rating of 4.5% of the upper extremity.

11. On February 10, 2004, Dr. Clawson performed an IME for Employer. Radiographs taken that day revealed radiocarpal arthrosis and stage 3 osteoarthritis of the left thumb basal joint. He agreed with Dr. Crane's assessment as documented in paragraph number nine above. Dr. Clawson observed, "I believe that Keith has more than just sensory residual from his ulnar nerve neuropathy, he demonstrates motor weakness." Claimant's Exhibit 5, p. 8. Dr. Clawson agrees with Dr. Crane's 60-40 apportionment and that Claimant's wrist problems are not related to Claimant's accident. He does not believe there is any surgical option for Claimant's ulnar nerve dysfunction, but suggests a carpometacarpal ("CMC") arthroplasty to abate his basal joint pain.

12. Dr. Clawson again examined Claimant for an "update" at Employer's request on February 3, 2005. At that time, Claimant was still complaining of a sore left thumb, but indicated that he was experiencing less numbness in his ulnar nerve distribution. Claimant had been able to return to work with brick rather than cinderblock for about four months in late 2002, and about a week's worth of cinderblock work. Dr. Clawson determined Claimant to be stable insofar as his ulnar nerved was concerned and agreed with Dr. Phillips' 4.5% upper extremity PPI. Regarding Claimant's left thumb basal joint arthrosis, Dr. Clawson agreed with Dr. Crane's PPI and 60-40 apportionment. He again recommended the CMC arthroplasty for pain control.

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13. Claimant was seen for another IME with Dr. Phillips and Michael Weiss, M.D., a physiatrist, on May 17, 2006. Drs. Phillips and Weiss ("the panel") reached the diagnosis of osteoarthritis and status post left ulnar nerve transposition with residual ulnar nerve neuropathy. The panel indicated that, "It is possible that it [the industrial accident] accelerated or aggravated his pre-existing arthritis and accepting that, it would seem reasonable to apportion that part of his lost range of motion of his wrist and thumb that is asymmetrical to that hyperextension injury using his other side as a control." Claimant's Exhibit 8, p. 5. The panel assigned Claimant a 10% whole person PPI rating that included range of motion discrepancy of the left upper extremity compared to the right, as well as the ulnar nerve injury in the left upper extremity. The panel gave Claimant no restrictions relating to his industrial accident; any restrictions were related to his underlying osteoarthritis.

DISCUSSION AND FURTHER FINDINGS

Medical benefits:

Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. It is for the physician, not the Commission, to decide whether the treatment is required. The only review the Commission is entitled to make is whether the treatment was reasonable. *See Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 779 P.2d 395 (1989). A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 890 P.2d 732 (1995).

14. Two of Claimant's treating physicians, Drs. Crane and Clawson, have opined that CMC arthroplasty surgery on Claimant's left thumb basal joint may be a reasonable approach to

treating Claimant's thumb pain. Employer has provided no evidence to the contrary. The Referee finds that the surgical procedure recommended by Dr. Clawson is reasonable and, should Claimant elect to undergo the procedure, is entitled to the same. The Referee declines to apportion medical benefits and Employer is liable for 100% of the costs associated with the procedure.

Medical stability:

15. The Referee finds that Claimant was medically stable by at least February 3, 2005, when Dr. Clawson assigned his PPI rating.

Permanent partial disability:

"Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent non-medical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the

Commission may deem relevant, provided that when a scheduled or unscheduled income benefit is paid or payable for the permanent partial or total loss or loss of use of a member or organ of the body no additional benefit shall be payable for disfigurement.

The test for determining whether a claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with non-medical factors, has reduced the claimant's capacity for gainful employment." *Graybill v. Swift & Company*, 115 Idaho 293, 294, 766 P.2d 763, 764 (1988). In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. *Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995).

Claimant contends that he is entitled to PPD of 50% of the whole person based solely on a comparison of his pre-injury wage and wages he may expect should he now return to work. He does not indicate whether such rating includes his 10% whole person PPI. Employer contends that Claimant is unemployed solely due to his lack of motivation to return to the work force and that if any PPD above impairment is found, such should be apportioned to his significant pre-existing osteoarthritis.

Two private vocational rehabilitation counselors and one Industrial Commission Rehabilitation Division ("ICRD") consultant have expressed opinions in this matter.

ICRD Consultant Irene Sanchez:

16. The ISIF referred Claimant to ICRD on September 16, 2005; Irene Sanchez was assigned to his case. Claimant's then-attorney was "quite surprised" by the referral as Claimant was receiving social security benefits. On November 30, 2005, Claimant informed Ms. Sanchez that he did not wish to pursue retraining or on-the-job training nor did he wish to participate in a job search. The ICRD file was closed on that date due to insufficient information that Claimant

was released to return to work. The file was apparently reopened as Claimant was re-interviewed on January 20, 2006. An entry dated January 23, 2006, in Ms. Sanchez's case notes is informative:

> The claimant stated he has no desire to return to work at a minimum wage position. He said that he has not applied for work that is not related to masonry. He is currently receiving social security disability benefits and has been since January 2002. The claimant said he is not able to seek work because of other factors that are not related to his industrial injury.

Claimant's Exhibit 11, p. 3.

17. Claimant informed Ms. Sanchez that he was earning $22.00 an hour at the time of his injury and that he was not interested in working for less. Ms. Sanchez identified certain jobs she thought he could perform in the minimum wage or slightly higher range. However, "[t]he claimant has stated based upon his current living situation,[2] he was not interested in seeking work." *Id.*, p. 4.

Mary Barros-Bailey:

18. Mary Barros-Bailey is a vocational consultant familiar to the Commission. She was retained by the ISIF to prepare an employability evaluation. She prepared a report dated May 30, 2006, with two supplemental reports and was deposed. She interviewed Claimant on May 18, 2006. She noted that Claimant has been on social security disability since May 2000. Ms. Barros-Bailey reported that Claimant's work history consisted of both rough and finish carpentry, heavy equipment operator, truck driver, painter, all aspects of house building, and masonry. He has expressed an interest in the operation and maintenance of computers and had an "elaborate" computer set-up in his home. Ms. Barros-Bailey commented on Claimant's knowledge of computers and his enjoyment in that "hobby." Ms. Barros-Bailey opined that Claimant has lost access to most skilled and semiskilled jobs previously accessible due to his

[2] Claimant was residing with and caring for his elderly mother at the time.

limitations, leaving him with unskilled to low-level semiskilled positions even though he possesses transferrable skills. She agreed with the potential positions identified by Ms. Sanchez in the $5.15 to $8.50 range but reported that Claimant was not interested in employment paying less than his $22.00 an hour time-of-injury wage. Ms. Barros-Bailey reported that there was a pool of jobs available even after Dr. Crane's latest restrictions; however, she did not quantify Claimant's PPD above his PPI, as she was not asked to offer an opinion regarding his disability.

Barbara Nelson:

19. Barbara Nelson is a private vocational consultant familiar to the Commission. She was retained by Employer to prepare an employability evaluation. She authored a report dated October 30, 2006, and was deposed. She interviewed Claimant on September 27, 2006. Ms. Nelson described her assignment as "difficult" due to the lapse of time since Claimant's accident and the progression of non-industrial related arthritis. Another problem she faced was that the physicians who gave restrictions did so based on his non-industrial underlying arthritic condition, rather than on the consequences of his industrial accident.[3] Ms. Nelson, in her report, conducted labor market research on jobs that would have been appropriate for Claimant without consideration of his post-injury arthritic condition. Ms. Nelson used the restrictions given by Dr. Weiss as they were the most recent, even though Dr. Weiss did not believe Claimant had any restrictions resulting from his industrial accident and injury. Ms. Nelson opined that Claimant could find work in his geographic area as a brick layer or RV manufacturer worker. However, once Ms. Nelson was informed of Dr. Crane's restrictions, she acknowledged that Claimant would not be able to lay brick or work in the two RV manufacturing plants she identified in her report. Nonetheless, she did identify certain jobs he was capable of performing. Moreover, Ms.

[3] Ms. Nelson was unaware until her deposition that in March 2007, Dr. Crane limited Claimant to no lifting over ten pounds with his left hand and no pushing or pulling greater than ten pounds with his left hand based solely on Claimant's industrial accident.

Nelson was aware that Claimant was not willing to return to work for less money than his time-of-injury pay. She did not quantify the extent of Claimant's PPD above his PPI.

20. Complicating factors in arriving at an appropriate PPD rating in this matter include Claimant's reluctance to accept employment paying less than $22.00 an hour (employment that does not exist for him), and the disagreement among physicians regarding whether any limitations that have been assigned are due to his industrial accident or his underlying osteoarthritis. However, in describing the thumb and hand manipulation required to set blocks, Claimant indicated that it took a combination of his left thumb (pre-existing arthritis) along with the part of his hand along his ulnar nerve distribution (his ulnar nerve injury was due to his industrial accident alone) and that without that combination, he can no longer set blocks (or bricks, according to Dr. Crane's restrictions). Of greater concern is Claimant's lack of interest in returning to work at a salary less than the $22.00 an hour he was making at the time of his industrial accident. Because of this lack of interest and/or motivation, it matters not how many or what types of jobs may be available to Claimant, he will not pursue them.

21. When considering the physician's restrictions, the vocational expert opinions, Claimant's age and lack of interest/motivation to return ot the work force, and the unavailability of jobs paying anywhere near what a block setter makes,[4] as well as those factors mandated by statute, the Referee finds that Claimant has incurred PPD of 40% of the whole person inclusive of his 10% PPI.

[4] The Referee is not convinced that a simple comparison of Claimant's pre-injury wage to wages likely to be earned post-injury alone is an accurate reflection of his disability. *See, Baldner v. Bennett's, Inc.*, 103 Idaho 158, 649 P.2d 1214 (1982).

Apportionment:

Idaho Code § 76-406(1) provides:

> In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.

22. The Referee declines to recommend apportioning Claimant's PPD in this case. As indicated above, there are two movements that must be made in combination to set block. Without the thumb and the hand, Claimant can no longer set block. Prior to his accident, Claimant had no significant problems performing his job. There may be an argument that the arthritis in the basal joint of Claimant's thumb was only temporarily aggravated by his accident, but there is no argument that the ulnar nerve injury and resultant motor weakness in the ulnar nerve distribution was a direct result of the accident, and the Referee is not willing to attempt to split that hair. The fact remains that Claimant was performing his customary work before his accident and he is not able to post-accident, and that inability to do so was not prolonged or increased due to any preexisting physical impairment.

Odd-lot:

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment together with the relevant nonmedical factors totals 100%. If a claimant has met this burden, then total and permanent disability has been established. The second method is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939, P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other

than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

23. Claimant has failed to prove he is permanently and totally disabled by either of the above two methods. His whole person PPI is only 10%. Claimant has not attempted work within his restrictions without success, has not sought work or had others search for work, and has failed to establish that a work search would be futile. See *Boley v. State, Industrial Indemnity Fund*, 130 Idaho 278, 281-283, 939 P. 2d., 942-943 (1997).

ISIF liability:

Idaho Code § 72-332 provides:

> **Payment for second injuries from industrial special indemnity account, --** (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease arising out of and in the course of his [or her] employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for payment of compensation benefits only for the disability caused by the injury or occupational Idaho Code § 72-332 disease, including scheduled and unscheduled permanent disabilities, and the injured employee shall be compensated for the remainder of his income benefits out of the industrial special indemnity account.
>
> (2) "Permanent physical impairment" is as defined in section 72-422, Idaho Code, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or occupational disease,

> of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. This shall be interpreted subjectively as to the particular employee involved, however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.
>
> There are four elements that must be proven in order to establish liability of ISIF:
>
> 1. A pre-existing impairment;
>
> 2. The impairment was manifest;
>
> 3. The impairment was a subjective hindrance to employment; and,
>
> 4. The impairment combines with the industrial accident in causing total disability. *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990).

24. As Claimant is not totally and permanently disabled, ISIF cannot be liable as a matter of law.

Retention of jurisdiction:

The Industrial Commission has the discretion to retain jurisdiction in the event a surgical procedure might take place beyond the applicable statutes of limitation. See *Reynolds v. Browning Ferris Industries*, 113 Idaho 965, 969, 751 P. 2d., 113, 117 (1988).

25. Claimant may, or may not, elect to have surgery for this basal joint thumb problem. There is no statute of limitation regarding medical benefits pursuant to Idaho Code § 72-432. There is no evidence of record that such a surgery will result in time loss benefits as Claimant is, and likely will not be, working when, and if, he has the surgery. Further, there is no evidence that the recommended surgical procedure will result in an increase of PPI and PPD. The Referee finds that this is not a proper case for the retention of jurisdiction.

Attorney fees:

Idaho Code § 72-804 provides for an award of attorney fees in the event an employer or its surety unreasonably denies a claim or neglected or refused to pay an injured employee compensation within a reasonable time.

26. The only evidence of record that Employer denied Claimant's surgery is this statement by Claimant in his first deposition:

> Q. They haven't done anything on your hand?
>
> A. No. They were going to, but workers comp canceled it. They said they will not fix it.

Claimant's August 12, 2004, Deposition, p. 44.

Employer asserts that Claimant never requested the procedure and, therefore, Employer could not have denied it. The record supports that assertion and attorney fees will not be awarded.

CONCLUSIONS OF LAW

1. Claimant is entitled to the CMC arthroplasty of his left thumb basal joint without apportionment.

2. Even though Claimant is entitled to further medical treatment, he was nonetheless declared medically stable by at least February 3, 2005, when Dr. Clawson assigned a PPI rating.

3. Claimant is entitled to a whole person 40% PPD rating and benefits accordingly.

4. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

5. Claimant is not an odd-lot worker.

6. ISIF is not liable and the Complaint filed against it should be dismissed with prejudice.

7. Retention of jurisdiction is not warranted.

8. Claimant is not entitled to an award of attorney fees.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this __19th__ day of March, 2008.

INDUSTRIAL COMMISSION

___/s/_____
Michael E. Powers, Referee

ATTEST:
____/s/_____
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEITH F. BRAEGGER, Claimant, v. PETE MICKELSEN & SONS MASONRY, INC., Employer, and INSURANCE COMPANY OF THE WEST, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2000-016939** **ORDER** Filed March 21, 2008

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is entitled to the CMC arthroplasty of his left thumb basal joint without apportionment.

2. Claimant was medically stable by February 3, 2005.

3. Claimant is entitled to a whole person 40% permanent partial disability rating inclusive of his 10% whole person permanent partial impairment.

4. Apportionment pursuant to Idaho Code § 72-406 is not appropriate.

5. Claimant is not an odd-lot worker.

6. ISIF is not liable and the Complaint filed against it is dismissed with prejudice.

7. Retention of jurisdiction is not warranted.

8. Claimant is not entitled to an award of attorney fees.

9. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __21st__ day of _____March_____, 2008.

INDUSTRIAL COMMISSION

_____/s/_____
James F. Kile, Chairman

____/s/_____
R.D. Maynard, Commissioner

____/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __21st____ day of _____March_____ 2008, a true and correct copy of **FINDINGS, CONCLUSIONS, AND ORDER** were served by regular United States Mail upon each of the following:

MARK R WASDEN
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ge _____/s/_____